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Supreme Court, U.S.
FILED
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87-625

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

HERITAGE MUTUAL INSURANCE COMPANY, appellee

vs

S.A. SCHAPIRO, appellant

APPEAL FROM THE COURT OF APPEALS OF WISCONSIN

APPELLANT'S JURISDICTIONAL STATEMENT

S.A. SCHAPIRO
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THE UNITED STATES
SUPREME COURT
pro se

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QUESTION PRESENTED

Did the Wisconsin Court of Appeals err in holding Wisconsin Statute section 814.025 constitutional under the due process clauses of the 5th amendment to the Federal Constitution, as applied to the states and state action by the due process clause of the 14th amendment to the Federal Constitution, by its holding that the lack of criteria and statutory guidelines as to allocation and apportionment of attorneys fees between attorney and client in said statute did not violate the vagueness repugnancies of said constitutional provisions?

OPINIONS BELOW

The opinions of the Court of Appeals, the first finding 814.025 applicable, and the second, finding 814.025 constitutional, are incorporated in the appendix.

The opinion of the trial court on remand is incorporated in the appendix.

The order of the Wisconsin Supreme Court denying the petition for review is incorporated in the appendix.

None of the opinions have been published.

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STATEMENT OF JURISDICTIONAL GROUNDS

The proceeding in the trial court was in tort in which plaintiff (not a party to this appeal) sued for bad faith, and in which appellee counterclaimed for attorneys fees under Wisconsin Statute 814.025, alleging plaintiff's suit for punitive damages was frivolous.

The Wisconsin Court of Appeals held that Sec. 814.025 of the Wisconsin Statutes did not violate the due process guarantees that appellant argued violated the vagueness repugnancies of the 5th and 14th amendment due process clauses of the Federal Constitution. The opinion of the Wisconsin Court of Appeals is dated July 15, 1987. The Wisconsin Supreme Court, by an order dated August 18 1987, denied a petition to appeal said decision of the Wisconsin Court of Appeals.

The jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals of Wisconsin is conferred by 28 U.S.C. 1257 (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 14th amendment of the United States Constitutionl provices in section one thereof, in part, as follows:

> "No state shall deprive any person of life, liberty or property, without due process of law..."

The 5th amendment of the United States Constitution provides for similiar protection.

Section 814.025 of the Wisconsin Statutes provides as follows:

> "Costs upon Frivolous Claims and Counterclaims-
> (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the Court, the court shall award to the successful party costs determined under section 814.04 and reasonable attorneys fees.
> (2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim, or the attorney representing the party, or may be assessed so that the party, and the attorney each pay a portion of the costs and fees.
> (3) In order to find an action, special proceeding, counterclaim,defense or cross complaint to be frivolous under sub. (1) the Court must find one or

more of the following:

(a) The action, specialproceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith,solely for the purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

(Relevant parts emphasised)

STATEMENT OF THE CASE

Plaintiff, represented by appellant, sued appellee for bad faith in denial of benefits under a contractor's liability policy. Appellee counterclaimed for attorneys fees under sec. 814.025 of the Wisconsin statutes, set forth hereinabove, alleging that that part of plaintiff's claim seeking punitive damages was frivolous. The trial court dismissed the counterclaim after trial and appellee appealed that dismissal to the Wisconsin Court of Appeals, which reversed the trial court and remanded the case for the trial court to impose such fees, without designating whether the fees should be imposed solely on the plaintiff, solely on the appellant, his attorney, or be apportioned between plaintiff and appellant in any manner. After said reversal, in the trial court, once said liability for fees was declared by the Court of Appeals of Wisconsin, without any designation as to who should be the one responsible for their payment, appellant withdrew as counsel for

plaintiff and alleged the constitutional infirmity of said statute under the 5th and 14th amendments to the Federal Constitution's vagueness repugnancy restrictions, by reason of said statute having no criteria or guidelines on which to impose the fees, namely, whether to impose such on plaintiff, or on his attorney in the alternative, or, whether such fees shoulc be apportioned between attorney and client, and if so,on what basis the apportionment should be made. Appellant raised said constitutional challenge on remand after he withdrew as counsel for plaintiff by seeking to file a reply on his own behalf as a party to the suit (since appellee sought fees from him, also), by pleading such constitutional infirmity of the statute as an affirmative defense to the counterclaim, but the trial court refused to allow appellant to plead to the counterclaim on his own behalf as a party. The

case then went to trial on the counterclaim of appellee for fees under 814.025, and the court imposed all said fees on appellant, and in doing so, formulated its own criteria for such - namely, because appellant drafted the pleadings, and the client, the plaintiff, was uncollectible. Appellant appealed, and the Wisconsin Court of Appeals entertained the constitutional challenge, holding the sttute valid, and therefore, held that the trial court's refusal to allow appellant to plead to the counterclaim and allege the unconstitutionality of sec. 814.025 was not prejudicial to appellant. In so entertaining the challenge thus raised by appellant, the Wisconsin Court of Appeals relied on a prior Wisconsin Court of Appeals decison, Estate of Bilsie, 1983, 100 Wis.2d 342, 302 N.W. 2d 508. However, that case did not consider a vague-ness challege to 814.025. Appellant challenges the validity of said sec. 814.025 under the

vagueness repugnancies of the 5th amendment to the Federal Constitution, as applied to the states and state action and legislation by the due process clause of the 14th amendment, specifically, by reason of said statute having no guidelines or other criteria for a court to use in determining when the fees are to be imposed on the attorney, or alternatively, when the fees are to be imposed on the litigant, or further alternatively, when the fees are to be apportioned between attorney and litigant, and if so,on what basis and with what criteria such apportionment should be made.

THE FEDERAL QUESTION IS SUBSTANTIAL

In recent years a multiplicity of jurisdictions have enacted the same or similiar "frivolous action statutes" relating to trial court proceedings: California Code of Civil Proc. Sec. 128.5; Colorado Stats. sec. 13-17-101 thru 106; Connecticutt Stats. sec. 52-240A; Florida Stats. sec. 57.105; Idaho Stats. sec. 12-123; Indiana Stats. sec. 34-1-32-1; Iowa Stats. sec. 617.16; Kansas Stats. sec. 60-2007(b); Massachusetts Stats. sec. 152.14; Michigan Stats. sec. 600.2591; Minnesota Stats. sec. 176.225 and 549.21(2); Nebraska Stats. sec. 25-1711; New Hampshire Stats. sec. 507.15; New York Stats. CPLR 8308a; North Carolina Stats. 6-21.1; North Dakota Stats. 28-26-01-2; Pennsylvania Stats. sec. 42:8353 and 42: 2503; South Dakota Stats. sec. 15-17-35; Texas Stats. sec. Educ. 2.11; Utah Stats. sec. 78-27-56 ; Washington Stats. sec. 4.84.185; Wisconsin Stats. sec.814.025.

In addition, several jurisdictions have passed similiar enactments dealing with frivolous appeals: Arizona Stats. sec. 12-2106; California Code of Civil Procedure sec. 907; Kentucky Stats. sec. 73-02(4); Maine Stats. sec. 14:1802; Massachusetts Stats. sec. 211:10; Michigan Stats. sec. 213:128; Nebraska Stats. sec. 25-1711.

The vagueness repugnancy under the due process standards of the 5th amendment to the Federal Constitution as applied against the states and state action by the due process clause of the 14th amendment to the Federal Constitution is well established thru the ruling case law of the Supreme Court of the United States. See e.g., Gaccio v. State of Pennsylvania, 1966, 382 U.S. 399, 86 S. Ct. 518, 15 L.ed. 2d 447; Buggett v. Bullitt, 1964, 377 U.S. 360, 84 S. Ct. 1316, 12 L.ed. 2d 377; Connally v. General Construction Company, 1926, 269 U.S. 385, 46 S. Ct.126, 70 L.ed. 322;

Papachristou v. City of Jacksonville , 1972, 405 U.S. 156, 92 S. Ct. 839, 31 L.ed 2d 110; Grayned v. City of Rockford, 1972, 408 U.S. 104, 92 S. Ct. 2294, 33 L.ed. 2d 222; Kolender v. Lawson 1982, 461 U.S. 352, 100 S. Ct. 1855, 75 L.ed.2d 903. In Grayned, supra, the Court set forth three areas of condemnation regarding vagueness in state legislation, the second of which applies to the apportionment and allocation deficiencies of Sec. 814.025:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application..."
> (Emphasis added)

The opinion of the Wisconsin Court of Appeals relied on a state court case, Estate of Bilsie, supra, with respect to appellant's due process challenge therein. However, neither Bilsie nor the Wisconsin Court of Appeals in the case at bar specifically discussed the vagueness challenges or the United States Supreme Court cases cited hereinabove, and argued in the Wisconsin Court of Appeals by appellant, in reaching the opinion expressed in both said cases, that the statute did not violate due process, nor did the Court of Appeals make any reference to vagueness deficiency in determining that the statute did not violate due process.

The statute at bar, prima facie, with respect to the second of the three due process vagueness deficiences set forth in Grayned, is violative of said constitutional protection.

Persuasive dissenting opinions of the Court on the matter of substantiality, indicate that this type of statute and the situation presented, showing important and difficult constitutional questions with respect to a statutory scheme prevailing in a majority of states, present a substantial Federal Constitutional question, precluding dismissal of the appeal. Fresh Pond Shopping Center v. Callahan , 1983, 464 U.S. 875, 104 S. Ct. 218, 78 L.ed. 2d 215. See also Wright v. New Jersey , 1984, 105 S. Ct. 890,469 U.S. 1146, 83 L.ed. 2d 906 . In Wright, the dissenters appropriately pointed out that there is a requirement that the lawmaker establish minimum guidelines to cover law enforcement, citing Kolender, supra, and Lewis v. City of New Orleans,1974, 415 U.S. 130, 135, 94 S.Ct. 970,973, 39 L.ed. 2d 214. At bar, the statutes make no reference as to when or under what circumstances, the litigant

shall be liable for the fees, when, and under what circumstances the attorney shall be liable for such fees, and when, under what circumstances, and by what guidelines, if both are responsible, the apportionment of fees between attorney and client is to be made.

The substantiality of such vagueness questions in this litigious society cannot be underscored.

CONCLUSION

There are several factors which reflect the importance of this case:

1. A majority of states have the same or similiar statutes as Wis. Stat. Sec. 814.025.

2. The statute appears prima facie invalid under the second of the criteria of Grayned, supra, by its lack of guidelines and criteria which judges need to apply to determine when fees are to be imposed on litigants, when on attorneys, when to be apportioned, and on what basis such apportionment should be made.

3. Attorneys in all jurisdiction face potential conflicts of interests with the very client in pending litigation, when an opponent raises the issue of frivolousness or the claim or defense set forth, by reason of possible ultimate or alternative liability for such opponents fees.

4. The Wisconsin Court of Appeals not having given any reference to the controlling case of law the United States Supreme Court, argued by appellant, and cited herein, in reaching its decision that the statute was valid under a vagueness challenge under the 5th and 14th amendment due process requirements.

5. That fact that persons without means would be unable to obtain legal redress for civil wrongs if criteria such as were formulated by the trial court at bar, were bases to impose all the fees on the attorney, since attorneys would be reluctant to represent the less fortunate when the liability for an opponents fees were shifted to the attorney because of the uncollectibility of the client.

The issue is so substantial and of such public importance that it requires plenary consideration briefs on the merits and oral argument.

Respectfully,

S.A. SCHAPIRO
Member of the Bar
United States
Supreme Court
Appellant pro se

APPENDIX

Index to Appendix:

1. Opinion of the Wisconsin Court of Appeals on Cross Appeal of Appellee

2. Opinion of the trial court on raising constitutional issues

3. Opinion of Wisconsin Court of Appeals on challenge to constitutionality of Sec. 814.025 Wis.Stats.

OPINION OF WISCONSIN COURT OF APPEALS
ON FIRST CROSS APPEAL OF APPELLEE

(Formal and irrelevant parts omitted)

PER CURIAM...

The trial Court found that Barts' punitive damage claim was frivolous. The trial court declined, however, to award reasonable attorneys fees and costs under sec. 814.025 Stats., because the entire action was not frivolous. Heritage challegnes that refusal to award fees on cross appeal.

We reverse that portion of the trial court's decision. Reasonable attorneys fees and costs under sec. 814.025, Stats., are recoverable if an individual claim is frivolous. Stoll, 122 Wis. 2d at 511-12, 362 N.W. 2d at 186-87. Therefore, upon its finding that the punitive damages claim was frivolous, the trial court should have determined and awarded reasonable attorneys fees and costs attributable to the frivolous claim. Upon remand, the trial court is directed to conduct whatever proceedings necessary to that determination.

DECISION OF THE TRIAL COURT ON REMAND AFTER THE WISCONSIN COURT OF APPEALS REVERSED THE EARLIER TRIAL COURT DECISION THAT THE CASE WAS NOT ONE IN WHICH ATTORNEYS FEES WERE IMPOSABLE UNDER THE FRIVOLOUS ACTION STATUTE.

There have been motions and other issues submitted by letters from counsel. The plaintiff was represented by Attorney S.A. Schapiro, but now represents himself. The defendant is represented by attorney James Mohr.

The case has been remanded by the Court of Appeals with directions.

The Court of Appeals decision in this case filed on May 1, 1985 states as follows on pages 9 and 10:

> "Reasonable attorneys fees and costs under section 814.025, stats., are recoverable if an individual claim is frivolous, even if the remaining aspects of the action are not frivolous. Stoll, 122 Wis. 2d at 511-12, 362 N.W. 2d at 186-7. Therefore, upon its finding that the punitivie damages claim was frivolous, the trial court should have determined and awarded reasonable attorneys fees and costs attributable to the frivolous claim. Upon remand, the trial court is directed to conduct whatever proceedings necessary to that determination."

Among other things, plaintiff's counsel now seeks to raise the issue of the constitutionality of the frivolous claim statute, sec. 814.025. How does counsel for plaintiff raise the issue? He does so by filing a reply to counterclaim raising the constitutional issue on Nov3mber 5 1986 with an accompanyhing letter dated November 3 1985 stating:"I could not locate any reply to the counterclaim on file in this case. This was an oversight and I enclose the same herewith". Thje reply was not served on defense counsel until his letter of transmittal.

Sec. 801.14(4) Stats. provides in part, "All papers after the summons required to be served upon a party shall be filed with the Court within a reasonable time after service". Filing a pleading in a case after trial and six months after the decision has been rendered by the Court of Appeals is not filing "within a reasonable time." The answer, affir-

mative defense and counterclaim which raised the issue that the punitive damage claim was frivolous were filed on January 11, 1983. This court has the right to strike plaintiff's reply to the counterclaim which was filed far too late in this case.

The issue of the constitutionality of the frivolous claim statute on whatever grounds was not raised before, during or after trial. It was not raised on appeal and it is too late to raise it now.

As stated in State ex rel Lisbon Town Fire Ins. Co. v. Crosby 240 Wis. 157, 160, "...the well established rules (are) that whenever legal propositions are laid down upon appeal to this court, they become the law of the case upon all future trials or appeals; ...and that a litigant is concluded by the mandate of this court as to all matters actually presented or which might consistently with legal rules have been presented to this court upon appeal."

Also, in Litzen v. Eggert, 238 Wis. 121, 122, the court stated that once the appeal has been determined "... there was no longer open for consideratifon by the trial court any other questions presented by the record which could have been litigated upon that appeal".

The issue of the constitutionality of the frivolous claim statute cold have been raised on the appeal, but it was not. The trial court is strictly limited to the purpose of remand, which is to determine and award reasonable attorneys fees and costs atrributable to the frivolous claim for punitive damages. This court cannot consider anything else.

Next counsel for plaintiff contends that since counsel for the defendant is a salaried employee of the defendant, the defendant cannot recover any attorneys fees. It is counsel's contention that it did not cost Heritage anything in attorneys fees to defend this case because their attorney is paid a salary. If this were

ture, the frivolous claim statute could never be invoked when a corporation is sued and is represented by house counsel who is paid a salary or when counsel is paid an annual retainer by the client. If could never be invoked when an attorney representes a client pro bono without charging the client a fee.

The language of the statute is clear. It calls for the payment of reasonable attorneys fees, not actual attorneys fees.

In rejecting this trial court's finding that when there is a claim which is not frivolous, is coupled with a claim that is frivolous a party is not entitled to frivolous claim costs as in this case, the Court of Appeals cited Stoll v. Adriansen 122 Wis. 2d 503, 511-12, which held as follows:

> "Although there is no express authority in sec. 814.025, stats., to separately consider the frivolousness of various claims which constitute an action, we conclude that a reasonable and sensible

> reading of the statute requires such an approach. To conclude otherwise would frustrate the obvious purpose of the statute. Were we to accept the Stoll's argument, a party could assert a marginally meritorious claim and numerous frivolous claims, but yet avoid the statute's sanctions. This interpretation is unreasonable because it allows for the very abuse of the judicial system that the statute seeks to prevent.Unreasonable and absurd consequences in the application of the statute are to be avoided even where the language of the statute conveys a plain meaning. White v. General Casualty Co., 118 Wis. 2d 433, 438, 348 N.W.2d 614, 617. (Court of Appeals, 1984).

To hold that when defendant's attorney is a salaried employee the defendant cannot recover frivolous claim, costs would also frustrate the obvious purpose of the statute. It would mean that anyone could bring frivolous claims against any corporation that has salaried house counsel representing it and avoid the statute's sanctions. A frivolous claim is a frivolous claim no matter who represents a defendant against whom the claim is made. The frivolous claim statute has been held to be constitutional in Estate of Bilsie, 100 Wis. 2d 342. The assessment of reasonable attorneys fees is the

sanction against anyone who brings a frivolous claim.

Counsel for defendant, at the court's direction, submitted an affidavit setting forth the hourse spent in defense of the punitive damage claim, the nature of the work, and the hourly rate charged by lawyers for similiar work in support of the claim for reasonable attorneys fees. This is a basis for making the determination required by the remand from the Court of Appeals. It is subject to the cross examination of the affiant and other relevant evidence.

Counsel for plaintiff has sought to obtain copies of defendant's counsel's tax returns. Defendant's counsel objects. Such returns would show counsel's annual salary, but any other sources of his income are irrelevant and it would invade his privacy to require the production of his tax returns..

It is questionable as to whether counsel's salary contract with the defendant is relevant to the inquiry as to what constitutes reasonable attorneys fees. If such evidence is admissible on the issue, it can be obtained by simply asking counsel what his salary is. However, if there is an objection to the evidence of the salary, counsel will be heard on the objection at the time of the hearing and it will then be decided whether such evidence is admissible.

Throughout the above reference has been made to Mr. Schapiro as being the counsel for the plaintiff because he was plaintiff's counsel until recently when he was replied of his representation of the plaintiff, Allan Barts. He withdrew because of a potential conflict of interest in that the reasonable attorneys fees may be assessed against the attorney or his client. A copy of this decision will be sent directly to Allan Barts. A hearing on the issue will be scheduled and all interested parties will be notified.

/s/JOHN G. BUCHEN, Judge

DECISION OF THE COURT OF APPEALS ON APPEAL OF COUNTERCLAIM TRIAL.
(Decision dated July 15 1987)

PER CURIAM. S.A. Schapiro appeals from an order awarding the respondent, Heritage Mutual Insurance Company, attorneys fees of $5321 pursuant to sec. 814.025, stats. Attorneys fees were awarded by the trial court pursuant to this court's previous decision in Barts v. Heritage Mutual Insurance Co,, No. 84-0143 slip op. (Wis. Ct. App. May 1, 1985), wherein we held that the trial court was required to award reasonable attorney fees and costs based upon its finding that the punitive damages claim filed by Allan Barts was frviolous. Upon remand, the trial court awarded attorneys fees of $5,321 and assessed the fees against Schapiro who represented Barts prior to remand in this proceeding.

Schapiro raises nuermous issues on

appeal. Because we conclude that all of those issues must be resolved against him under principles of res judicata or on the ground that they are otherwise without merit,we affirm the trial court's order.

In his brief, Schapiro argues that the trial court abused its discretion by failing to make a specific finding that the punitive damages claim was commenced or continued in bad faith, solely for the purpose of harassing or maliciously injuring Heritage, or that Barts or Schapiro knew or should have known, that the punitive damages claim was without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification or reversal of existing law. Schapiro contends that a specific finding under sec.814.025 (3)(a) or (b) Stats., was necessary to support the finding of frivolousness and that, in its

absence, the finding of frivolousness must be set aside. He also contends that the facts of this case do not warrant a finding of frivolousness.

Schapiro's arguments regarding frivolousness are barred by principles of res judicata. It is a well established rule that whenever legal propositions are laid down upon appeal, those rulings become the law of the case in all future trials or appeals related to that case. State ex rel. Lisbon Town Fire Ins. Co. v. Crosby 240 Wis . 157, L¢), @ N.W. 2d 700, 701 (1942). A litigant is concluded by the mandate of the appellate court as to all matters which were actually presented or which might have been presented upon that appeal. Id.

In or prior decision in Barts, No. 84-0143, we noted that Barts did not directly challenge the trial court's finding that the punitive damage claim was frivolous and held that, in any event, the finding was not clearly err-

oneous. Id., slip op. at 11, n.3. We also held that upon its finding of frivolousness, the trial court was required to determine and award reasonable attorney fees and costs attributable to the frviolous claim, and remanded the matter for that purpose. Id. slip op. at 9-10. Because Schapiro represented Barts and failed to directly challenge the finding of frivolousness and because that finding was affirmed sby this court, Schapiro is precluded from challenging it now.

For the same reason, Schapiro's current claim that sec. 814.025 Stats., is unconstitutionally vaghue is barred. Schapiro contends that Sec. 814.025(2) is unconstitutional because it contains no guidelines for the trial court to follow in allocating fees between the attorney and client responsible for the frivolous claim. However, as with his challenge to the finding of frivolousness, Schapiro could have raised this challenge in

the original trial court proceeding when Heritage filed its counterclaim alleging frivolousness. He could have also raised the issue on appeal. However, he failed to do so, resulting in a remand to the trial court for an award of fees. Based on terms of the remand, the constitutionality of sec. 814.025(2) cannot be challenged now. See Lisbon Town Fire Ins. Co. 240 Wis. at 160, 2 N.W.2d at 701.

Even assuming we were required to reach the constitutionality issue, we would find no basis for disturbing the trial court's award. The Wisconsin Supreme Court previously held that sec. 814.025(3)(b) Stats., prescribes a standard of conduct for litigants and their counsel which is not void for vaguenss because it gives reasonable warning to parties and their counsel as to what type of conduct is proscribed and gives reasonable direction to the trialcourt for determining when it has been violated. Estate of Bilsie 100 Wis. 2d 342,

348-50, 302 N.W. 2d 508, 513-14 (Ct. App. 1981). Similiarly, sec. 814.025(2) clearly warns both counsel and client that if a frivolous claim is filed,the trial court may assess costs and fees fully against either the party bringing the claim or the attorney representing the party. Section 814.025 is thus sufficiently definite to alert a prudent attorney as to what is proscribed and what sanctions exist. Moreover, in this case the testimony of Barts and a stip- made by Schapiro at the hearing on fees indicate that Schapiro himself made the decision to file and pursue the punitive damages claim. Based on the testimony and stipulation, it cannot be said that sec. 814.025(2) was unconstitutionally vague as applied to Schapiro, or that the trial court abused its discretion by electing to assess the fees and costs against him.

Schapiro also argues that the trial court abused its discretion by denying his motion

for leave to file a reply to Heritage's counterclaim after remand and after Schapiro withdrew as counsel for Barts and mvoed to participate as a party. The trial court refused to permit the filing of a reply on the ground that the counterclaim was filed on January 11 1983 and the filing of a reply following remand was therefore untimely. It also noted that the issues raised in the reply were barred by the Court's mandage to award fees.

The filing of a reply following remand clearly was beyond the twenty day period prescribed in sec. 802.06(1), Stats., for filing a reply to a counterclaim. Moreover, even if the trial court should have exercised its discretion to permit Schapiro to file a reply after he withdrew as counsel for Bartz, we conduce that Schapiro was not prejudiced by the trial court's decision. Even without a formaly reply, Schapiro was

permitted to dispute the amount of fees to be awarded, as well as Heritage's right to recover fees paid to a salaried attorney, and Heritage's counsel's right to testify. Moreover, the trial court's refusal to permit Schapiro to file a formal reply did not prejudice his claims regarding the constitutionality of sec. 814.025, Stats., or the finding of frivolousness because, as discussed above, those claims were already either barred or without merit.

Schapiro's next argument is that the trial court abused its discretion when it denied his prehearing request for the income tax returns of Heritage's counsel, James Mohr. Schapiro contends that he needed the tax returns to determine Heritage's actual fees.

In denying Schapiro's motion for production of Attorney Mohr's tax returns, the trial court noted that while the returns would show his

annual salary, any sources of income other than Heritage were irrelevant to this proceeding. It then held that evidence as to the amount of salary paid by Heritage to Mohr could be obtained by Mohr's testimony,and if there was an objection to the evidence, counsel would be heard on the objection and the objection would be resolved at the time of the hearing on fees.

We conclude that the trial court properly exercised its discretion in refusing to compel production of the income tax returns on the ground that they wold provide information which was clearly irrelevant to this proceeding. Its exercise of discretion was also rendered reasonable by its decision to permit Schapiro to seek other evidence concerning the salary paid by Heritage to Mohr. Since it appears from the transcript of the hearing on fees that Schapiro subsequently failed to solicit testimony or other evidence as to the salary paid by Heritage and thus failed to take advantage of the opp-

ortunity offered by the trial court of having fan additional hearing on the issue if the evidence obtained by him was deemed inadequate, we find no basis for concluding that the trial court abused its discretion by denying Schapiro access to information on Heritage's actual attorney fees.

In his brief, Schapiro also contends that he w. improperly denied access to Mohr's time records. However, the record contains no order prohibiting Schapiro from obtaining the underlying records. The record indicates that the only motion filed by Schapiro related to the time expended by Mohr was a motion for an order requiring Mohr to file an itemized statement of his fees related to the punitive damage claim. Mohr filed an affidavit itemizing his hours, and that affidavit was admitted into evidence at the hearing on fees. No motion for the underlying time records was subsequently filed, nor were they subpoenaed for the hearing on fees. When

Schapiro asked to see them at the hearing and was told that they were not incourt, no further request was made. Based on these facts, no basis exists for determining that Schapiro was improperly denied access to the time records.

Schapiro's remaining arguments are equally unmeritorious. He contends that it was error to permit Mohr to testify at the fee hearing without withdrawing as counsel for Heritage. However, SCR 20.24(2)(c) (1986) expressly permits an attorney to testify while represeenting a client if, as here, his testimony will relate solely to the nature and value of legal services rendered by him to that client.

Schapiro also contends that it was improper for Heritage to be represented by Mohr in seeking attorney fees because Mohr is a salaried employee. He contends that since Heritage is a corporation it improperly engages in the practise of law by using a salaried employee as

its attorney. This argument borders on the absurd since Heritage was clearly represented by a licensed attorney, and the fact that he was paid a salary rather than an hourly fee or general retainer is irrelevant.

Schapiro also contends that the trial court should have declined to award attorneys fees based on a finding by the Board of Attorneys Professional Responsibility that determined his conduct in this case did not violate SCR 20.36 (1986). However, since the trial court's finding of frivolousness was affirmed by this court and could not be disturbed by the trial court following remand, the trial court acted properly in refusing to reconsider the finding of frivolousness based on the board' actions. See Lisbon Town Fire Ins. Co.240 Wis. at 160,2 N.W. 2d at 701.

The remaining argument raised by Schapiro is that the trial court's determination of fifty

percent of the fees incurred in this action were attributable to the punitive damage claim is arbitrary and without any basis in the evidence. We disagree. Attorney Mohr specifically testified at the hearing on fees that he spent 163.7 hours on the defense of this case, and that 128.2 hours were solely in the defense of the punitive damage claim. In addition, attorney Alvin Kloet appeared as a witness on behalf of Heritage and testified that he was familiar with the case and had appeared as a witness during the original trial. He testified that he had reviewed the record and Mohr's affidavit and concluded that both the total hours spent on the case and the method of allocating hours between the defense of the punitive and compensatory damage claims were reasonable. Based on the testimony of Attorneys Mohr and kloet, the trial court clearly did not abuse its discretion in determining that 81.85 hours

representing one half of the total time spent on the case, should be attributed to the punitive damages defense. Based on Schapiro's stipulation that $65 per hour constituted a reasonable rate in the Sheboygan area, the trial court therefore also properly exercised its discretion in awarding $5,321 in attorney fees.

We not that in his reply brief, Schapiro requests sanctions pursuant to rule 809.83(2) Stats., on the ground that Heritage has vilified him in its brief. Rule 809.83(2) authorizes this court to impose sanctions for failure to comply with the rules of this court, and is therefore not directly applicable here. In any event,we discern nothing in Heritage's brief which is outside the proper scope of argument on appeal.

By the Court -order affirmed.

No. 87-625

IN THE

Supreme Court, U.S.
FILED
OCT 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1987

S.A. SCHAPIRO, appellant

vs

HERITAGE MUTUAL INSURANCE COMPANY
Appellee

ON APPEAL FROM THE COURT OF APPEALS
OF WISCONSIN

APPELLANT'S SUPPLEMENTAL APPENDIX

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STATE OF WISCONSIN

IN SUPREME COURT

Allan Barts

vs ORDER

HERITAGE MUTUAL INS. CO.

VS

S.A. SCHAPIRO

Aug. 18 1987

The Court today announced an order in your case as follows:

No. 86-22;3 Barts v. Heritage Mutual Ins. Co. et al.

A petition for review pursuant to sec. 808.10 having been filed on behalf of appellant - petitioner S.A. Schapiro, and having been considered by the Court,

IT IS ORDERED that the petition is denied with $50 costs.

Heffernan C.J. and Day, J. did not participate.

MARILYN GRAVES Clerk of the Supreme Court

STATE OF WISCONSIN : CIRCUIT COURT
SHEBOYGAN COUNTY

ALLAN BARTS plaintiff

vs DECISION AND ORDER

HERITAGE MUTUAL INS. CO.defendant

On November 21 1983 a hearing was held on the motions after verdict in the above entitled action. Plaintiff appeared by attorney Schapiro and defendant by Attorney Mohr. The Court heard arguments of counsel and took the motions under advisement.

This was an action for damages for alleged bad faith denial of an insurnce claim brought by the insured against his insurance carrier. The verdict consisted of only two questions. One was the liability question which simply inquired whether the defendant exercised bad faith in handling plaintiff's claim and the damage question. Within a half hour after the case was submitted to the jury a unanimous verdict was returned finding

no liability and no damages. Motions after verdict are covered in Sec. 805.14 and 805.16 Stats.

Essentially plaintiff's motions are for a new trial (Sec. 805.16 Stats.). For the most part the arguments made by counsel are a restatement of the motions made at the instruction conference and during the trial when objections to the admission of certain evidence were ruled on after hearing arguments of counsel. The same cases were cited, namely, Meiser v. Aetna Casualty and Surety Co., 8 Wis. 2d 233 and Benke v. Mukwonago Ins. Co., 110 Wis. 2d 356. It was interesting to note that defendant's counsel originally requested a question in the verdict in regard to the policy exclusion "care, custody or control" and plaintiff's counsel objected. Later they switched positions. At any rate the court provided for only one liability question in the verdict which related to bad faith. Counsel for plaintiff now claims that it was error not

to give an instruction and question on "care, custody or control" in accordance with the Meiser case.

During the course of the trial the essential language in Meiser was read to the jury many times and two attorneys, one for each side,testified as to its application to the facts of this case. Attorney Halvorsen,testifying as an expert witness for the plaintiff, said that it applied directly to this case,and Attorney Kloet, testifying as an expert witness for defendant, said that it was distinguisable from the facts of the case and therefore, inapplicable. This situation undoubtedly gave the jury the basis for concluding that the defendant could "reasonably conclude that the claim is debatable or questionable" as they were instructed.

It was concluded at the instruction conference that no separate question be put to the jury in regard to "care, custody

or control", and that no instruction be given in regard to the same. The reasons for this decision were given on the record and those reasons are adopted by reference in this decision. This case did not involve a breach of contract. It was not an insurance coverage question but rather an action based on the tort of bad faith which is an intentional tort. What was material was whether the basis for the denial of the claim by the defendant was reasonably debatable.

Counsel for plaintiff also contends that plaintiff is entitled to a new trial on the grounds that the court failed to instruct the jury in accordance with the language in Benke, supra., 364 and 365, to the effect that a reasonable insurer must conduct a neutral and detached investigation before denying a claim. The Court gave the instruction set forth in Wis. JI - Civil 2761 "Bad Faith by Insurance Company: Assured's Claim" which included the foll-

owing language: "You may consider whether plaintiff's claim was properly investigated, and whether the results of the investigation were given a reasonable evaluation and review". This language adequatedly covered the holding in Benke, supra. The instruction cites Anderson v. Continental Insurance Co.,85 Wis. 2d 675 which case is cited as the authority for the holding in Benke. Benke did not change the law of the tort of bad faith denial of an insurance claim.

As to statements of counsel during the trial when certain objections were made to questions asked of various witnesses, both counsel engaged in excessive argument in the presence of the jury, but to excuse the jury whenever an objection was made would have unduly lengthened the trial. Both counsel can share the responsibility for whatever prejudice, if any, resulted from their statements. The jury was instructed as to how to treat objections of counsel.

The refusal to allow plaintiff's expert to give certain opinions was fully explained at the time of the objections and the explanation is adopted by reference to the trial record.

It was not error to permit defendant's counsel to cross-examine the plaintiff as to how and what he paid his employees. One of the subdivisions of the damage question called upon the jury to decide what loss of business income, if any, plaintiff sustained as a result of defendant's conduct. Such questioning of the plaintiff was directly related to plaintiff's claim for such loss and was relevant, not collateral to one of the issues of the case.

There was sufficient credible evidence to support the jury's verdict.

Plaintiff had the burden of convincing the jury to a reasonable certainty, by evidence which was clear, satisfactory

and convincing that the defendant acted in bad faith in denying plaintiff's claim. Plaintiff did not meet that burden. There was evidence which the jury was entitled to believe that established that the defendant was entirely justified in denying the claim.

Plaintiff's proof of damages was weak. Even though the psychiatrist testified based upon an examination very remote in time from the event that he believed that the defendant suffered emotional distress it was not severe in nature and there was evidence that plaintiff's loss of business was not solely attributable to the denial of the claim. Plaintiff earned more before and after going into business for himself. In addition the jury was not required to accept the opinion of plaintiff's expert medical witness, Dr. Bogost.

Considering the credibleevidence in support of the verdict, it cannot be found to be based on passion or prejudice and it

does not demonstrate perversity on the part of the jury. Plaintiff's motion for a new trial is denied.

In addition both counsel now seek reimbursement from the respective parties for the time of certain expert witnesses who were deposed. Apparently at one point counsel had agreed to absorb the cost of the time of their respective expert witnesses. At this late stage, after trial,it is too late to raise the issue of what are probably offsetting claims. It if was an issue it should have been raised by a pretrial motion, not at the time of motions after verdict.

If plaintiff's counsel believes he is entitled to the return of the witness fee he paid to John Holden he should look to him for repayment. He is not a party to this action.He was excused from appearing as a witness and had another witness bring the document he was subpoenaed to bring to court.

Considering the motions of counsel for defendant, he seeks costs and reasonable attorneys fees on the ground that plaintiff's claim was frivolous pursuant to section 814.025, Stats.

Plaintiff did not establish his claim for punitive damages and that damage claim was dismissed at the close of plaintiff's case. However, the court denied the motion to dismiss plaintiff's claim and ruled that sufficient evidence had been presented to warrant having the case go to the jury. The claim for punitive damages was without merit and can be deemed "frivolous" in nature, but punitive damages is not a claim as such, but is based on whether actual damages are awarded in which case if it is established that defendant's conduct was malicious in nature the jury can award exemplary damages in addition to actual damages.

The frivolous costs statue is based on the entire action being brought in bad faith

solely for the purposes of harassing or malicious injuring another and not simply one of the claims for damages potentially arising out of the action. Accordingly, this court denies defendant's motion for costs and reasonable attorneys fees on the groudns that the action was "frivolous" as that term is defined in Sec. 814.025 Stats.

However, defendant's counsel may add $50 motion costs in connection with the motion relating to the deposition of Robert Halvorsen heard on March 29 1983.

The matter of payment for the time spent by defendant's expert witness at a pre trial deposition has been decided above.

For failure to admit to the genuiness of plaintiff's hospital records without calling the custodian of the hospital records, as a witness, defendant is entitled to be reimbursed the cost of producing the records and the subpoena fee pursuant to sec. 908.03 (6m) Stats.

Defendant's motion for an order for judgment on the verdict, dismissing plaintiff's complaint and cause of action on the merits together with defendant's costs is granted.

Dated December 14, 1983.

BY THE COURT:

/s/ John G. Buchen
Judge